Supreme Court, U.S.
FILED

04 958 JAN 10 2005

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

THEODORE C. LANGE,

Petitioner

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals for the Federal Circuit.

PETITION FOR WRIT OF CERTIORARI

Theodore C. Lange
Pro se
398 Waldo Ave. SE,
Apt. 6F
Salem, OR 97302
503-316-9978

QUESTION PRESENTED

1. Should the United States Court of Appeals for the Federal Circuit be **Ordered** not to made issues of timeliness jurisdictional when other jurisdictions have held that filing deadlines were not jurisdictional?

2. Should the United States Court of Appeals for the Federal Circuit be **Ordered** to review and decide its case Theodore C. Lange v. Department Of The Interior (Docket Number 04-3372) rather than **Dismiss** the case as untimely?

LIST OF PARTIES

Respondent:

Department of the Interior
Represented By:
Ms. Claudia Burke
Department of Justice, Civil Division
Commercial Litig.
1100 L Street, N.W., Room 12112
Washington, D.C. 20530
202- 307-1011

Solicitor General Of The U.S.
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Petitioner:
Theodore C. Lange, pro se
398 Waldo Ave. SE, Apt. 6F
Salem, OR 97302
503-316-9978

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APPENDIX – B– Order from the U.S. Court of Appeal for the Federal Circuit declining a panel rehearing and ordering the petition for rehearing en banc to be circulated to the court dated Nov 9, 2004.

APPENDIX – C– Order from the Federal Circuit denying a rehearing en banc for the Court by Jan Horbaly, Clerk, on Nov. 23, 2004.

APPENDIX –D – Order issued as a Mandate that the motion for reconsideration is denied by Timothy B. Dyk, Circuit Judge on Nov. 30, 2004.

APPENDIX – E – Letter from the Clerk, Federal Circuit, notifying petitioner that his Appeal was received out of time, dated June 28, 2004.

APPENDIX – F – Letter of "Request For Reconsideration" by petitioner to the Federal Circuit, dated June 30, 2004.

APPENDIX – G – Declaration by petitioner concerning the date of the post mark on the envelope which contained the petitioner's appeal to the Federal Circuit.

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TABLE OF AUTHORITIES CITED

CASES:

Montoya v Chao, 296 F3d 952.955 (10th Cir 202)

Williams-Scaife v Department of Def Depen Schools 925 F2d 346,
348 (9th Cir 1991)

Blaney v US, 34 F3d 509, 512-513 (7th Circuit 1994)

.. IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review judgement below:

The opinion, orders. and mandate of the United States Court Of Appeals For The Federal Circuit appears at Appendix A, B, C, and D to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Federal Circuit decided subject case was August 23, 2004.

A timely petition for rehearing was denied by the United States Court of Appeals for the Federal Circuit on the following date: November 30, 2004, and appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. $ 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution — Right to fair and equal process — Right to reasonableness being applied in the formation of legal decisions.

STATEMENT OF THE CASE

A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.

REASON FOR GRANTING THE PETITION

The case file will show that the appeal mailed to the United States Court of Appeals for the Federal Circuit by the petitioner was post marked on June 11, 2004 (see Appendix G). That was five days prior to the filing deadline for the case. The Clerk of the Court stamped the appeal as being received on June 16, 2004, one day late of the June 15, 2004 deadline.(see Appendix E)

However, the case file will show that in notifying the petitioner that his appeal was "Received Out Of Time" the Clerk did not address the notification to the petitioner but to a Ms. Carroll, an unknown entity to the petitioner. (see Appendix E)

Despite the facts as stated above, the United States Court of Appeals for the Federal Circuit still imposed a "no exceptions" position on the matter of timeliness, and dismissed the case as being untimely filed. (see Appendix A,B,C,and D).

Other jurisdictions such as the 7th, 9th, and 10th Courts of Appeals do not maintain a jurisdictional position on issues of timeliness. This Court should therefore order the United States Court of Appeals for the Federal Circuit to reverse its decision in this case and for future issues of timeliness, making each case discretionary rather than jurisdictional.

REASON FOR GRANTING THE PETITION

The action of the Federal Circuit to dismiss the petitioner's appeal as untimely does not allow for errors that may have occurred within the court's clerk's office in the processing of an appeal. The record here indicates that indeed an error or errors occurred in the processing of the petitioners appeal at the Federal Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted. This Court should order the U.S. Court of Appeals for the Federal Circuit to reverse its dismissal of subject case for being untimely filed.

Respectfully submitted,

Theodore C. Lange, pro se

Date: Jan 10, 2005

APPENDIX "A"

NOTE: Pursuant to Fed. Cir. R. 47.6 this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

04-3372

THEODORE C. LANGE,

Petitioner,

V.

DEPARTMENT OF THE INTERIOR,

Respondent.

ON MOTION

Before NEWMAN, BRYSON, and DYK, Circuit Judges.
DYK, Circuit Judge.

ORDER

Theodore C. Lange moves for reconsideration of this court's previous rejection of his petition for review as untimely.

On June 16, 2004, this court received Lange's petition for review of an initial decision of the Merit Systems Protection Board that dismissed his appeal due to waiver of the only remaining issue on review. The Board's initial decision became final on April 16, 2004. A petition for review must be received by the court within 60 days of the Board's final decision or order. 5 U.S.C. $ 7703(b)(1). To be timely filed,

the petition must be received by this court on or before the date that the petition is due. "Pinat v. Office of Personnel Management", 931 F.2d 1544, 1546 (Fed. Dir. 1991.) (Petition is filed when received by this court; court dismissed petition received nine days late). If Lange's petition for review in this court was untimely filed, we must dismiss his petition for review. See "Monzo v. Dep't of Transp. Fed. Aviation Admin", 735 F.2d 1335, 1336 (Fed. Cir. 1984) (the period for petitioning for review is statutory, mandatory, and jurisdictional); Pinat, 931 F.2d at 1546 (deadline for filing petition for review may not be waived).

Here, Lange's petition for review was received by the court on the 61st day after the Board's decision became final. Thus, it must be dismissed.

Accordingly,

IT IS ORDERED THAT:

(1) The motion for reconsideration is denied and his petition for review is dismissed as untimely.

(2) Each side shall bear its own costs.

FOR THE COURT

"S/_____

Timothy B. Dyk
Circuit Judge

Date: Aug. 23, 2004

cc: Theodore C. Lange
Claudia Burke, Esq.

APPENDIX "B"

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

04-3372

THEODORE C. LANGE, – PETITIONER

V.

DEPARTMENT OF THE INTERIOR, – Respondent.

ON MOTION

Before NEWMAN, BRYSON, AND DYK, Circuit Judges.

Dyk, Circuit Judge.

ORDER

Theodore C. Lange petitions for rehearing en banc of this court's order denying his motion for reconsideration of this court's previous rejection of this petition for review as untimely.

Upon consideration thereof,

IT IS ORDERED THAT:

The panel declines rehearing. The petition for rehearing en banc will be circulated to the court.

FOR THE COURT

Dated: November 9, 2004

S/ _____

Timothy B. Dyk

Circuit Judge

APPENDIX "C"

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing en banc having been filed by the PETITIONER, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal; and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on November 30, 2004.

FOR THE COURT,

S/ _____

Jan Horbaly

Clerk

Dated: November 23, 2004

cc: THEODORE C. LANGE

CLAUDIA BURKE

LANGE V. INTERIOR, 04-3372

(MSPB - SE0752020259-B-1)

* The panel denied rehearing in the order issued on November 9, 2004

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

APPENDIX "D"

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

04-3372

THEODORE C. LANGE, – Petitioner,

v.

DEPARTMENT OF INTERIOR, – Respondent.

ON MOTION

Before NEWMAN, BRYSON, and DYK, Circuit Judges.

DYK, Circuit Judge.

ORDER

Theodore C. Lange moves for reconsideration of this court's previous rejection of his petition for review as untimely.

On June 16, 2004, this court received Lange's petition for review of an initial decision of he Merit System Protection Board that dismissed his appeal due to waiver of the only remaining issue on review. The Board's initial decision became final on April 16, 2004. A petition for review must be received by the court within 60 days of th Board's final decision or order, 5 U.S.C. $7703(b)(1). To be timely filed, the petition must be received by this court on or before the date that the petition is due. "Pinat v. Office of Personnel Management", 931 F.2d 1544, 1546 (Fed. Cir. 1991) (petition is filed when received by this court; court dismissed

petition received nine days late). If Lange's petition for review in this court was untimely filed, we must diismiss his petition for review. See "Monzo v. Dep't of Transp. Fed. Aviation Admin"., 735 F2d 1335, 1336 (Fed. Cir. 1984) (the period for petitioning for review is statutory, mandatory, and jurisdictional); Pinat, 931 F2d at 1546 (deadline for filing petition for review may not be waived).

Here, Lange's petition for review was received by the court on the 61st day after the Board's decision became final. Thus , it must be dismissed.

Accordingly,

IT IS ORDERED THAT:

(1) The motion for reconsideration is denied and this petition for review is dismissed as untimely.

(2) Each side shall bear its own cost.

FOR THE COURT

S/ _____

Timothy B. Dyk

Date: Aug. 23 2004 Circuit Judge

ISSUED AS A MANDATE: NOV. 30, 2004

cc: Theodore C. Lange

Claudia Burke, Esq

APPENDIX "E"

04-3372

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT
717 MADISON PLACE N.W.
WASHINGTON, D.C. 20439

JAN HORBALY JUN 28 2004
CLERK

Theodore C. Lange
398 Waldo Ave. S.E.
Apt. 6F
Salem, OR 97302

Re: LANGE V. INTERIOR (SE 0752-02-0259-L-1)

Dear Ms. Carroll:

I am returning your petition for review received in this office on June 16, 2004, because it was received out of time.

A petition for review must be received by this court "within 60 days after the date the petitioner received the notice for the final order or decision of the Board." 5 U.S.C. $7703(b)(1). If you sought review of the Administrative Judge's decision with the full Board, your petition for review in this court was due within 60 days after your receipt of the Board's decision or order regarding your petition for review of the Administrative Judge's decision. If you did not seek review of the Administrative Judge's decision with the full Board, your petition for review in this court was due within 60 days after the Administrative Judge's initial decision became final.

Because the court has no authority to waive the timeliness requirement, Fed. R. App. P. 26(b)(2), your petition must be

rejected. Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991); Fed. Cir. R. 4 ("The clerk may return a notice of appeal that is untimely on its face.")

Very truly yours,

" S/_____"
Jan Horbaly

APPENDIX "F"

04-3372

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Theodore C. Lange
398 Waldo Ave. S, Apt. 6F
Salem, Or 97302
June 30, 2004

Ref: Lange v. Merit System Protection Board (SE-0752-02-0259-I-1 and B-1)

REQUEST FOR RECONSIDERATION

I am writing concerning a letter I received from Clerk Jan Horbaly dated June 28, 2004 which states that my Petition For Review concerning the above listed case was not timely received.

I had previously filed a Petition For Review concerning this case on October 2, 2003. That previous filing was provided docket number with this Court as 04-3011. That petition was dismissed for lack of jurisdiction by this Court on January 14, 2004. The Merit System Protection Board had responded to the petition stating that the case was not closed due to a remand to hear an issue of Age Discrimination.

The Age Discrimination issue came to a conclusion after an Initial Decision dated March 12, 2004. In that decision the Administrative Judge stated that the Initial Decision would become final on April 16, 2004 and that I would have 60 days from that date to file with this Court.

APPENDIX "F"

Within that 60 day period I was still attempting to settle this case with the Agency (Department of Interior) involved in this case, without success. I therefore delayed mailing the Petition For Review. On June 11, 2004, I mailed out the Petition For Review at a U.S. Postal Service Office where I was assured that the mailing would be received by the Court no later than June 14 or June 15, 2004. However, that Petition For review was not received officially until June 16, 2004. That, according to the Clerk, was one day late.

The issue I have with the MSPB is minor in nature in that it only concerns an issue of whether or not a verbal Settlement Agreement is binding even though I had refused to sign the agreement. I had petitioned the MSPB to rescind the verbal agreement but the MSPB refused to do so.

I have noted that the letter I received from the Clerk was dated (post mark) on June 28, 2004 and was in my mail box in the morning of June 30, 2004. Also the letter was addressed to a "Ms. Carroll" and unknown person to me. Thank you for your attention.

"S/_____"

Theodore C. Lange, pro se

APPENDIX "G"

Declaration By Theodore C. Lange:

I, Theodore C. Lange, declare under penalty of perjury that the envelope in which I mailed my appeal to the Court Of Appeals For The Federal Circuit, addressed at 717 Madison Place, N.W., Washington, D.C. 20430 was post marked "Jun 11, PM, 2004, Salem, OR, 973.

Dated: December 29, 2004

_____

Theodore C. Lange

APPENDIX "H"

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REVISED

NOTICE OF DOCKETING

04-3372 - LANGE V. INTERIOR
07/22/04
(Date Of Docketing)

Petition for review of:
MERIT SYSTEMS PROTECTION BOARD

SE0752020259-B-1

Name of petitioner: THEODORE C. LANGE

JAN HORABLY, Clerk

APPENDIX "I"

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

04-3372

THEODORE C. LANGE – PETITIONER,

V.

DEPARTMENT OF INTERIOR – RESPONDENT.

PETITION FOR EN BANC DETERMINATION

CERTIFICATE OF INTEREST

Pro se petitioner certifies the following:

(1) Pro se petitioner's full name is : Theodore Charles Lange

(2) The name of the real party in this interest is: Merit System Protection Board.

Dated: October 3, 2004

S/ _____

Theodore C. Lange, pro se

STATEMENT BY PRO SE PETITIONER

Theodore C. Lange moves for reconsideration of this court's previous rejection of his petition for review as untimely.

On August 23, 2004 this court dismissed Lange's petition for review of a Merit System Protection Board decision as untimely.

APPENDIX "I"

Lange, appearing pro se, believes this appeal requires an answer to a precedent - setting question of exceptional importance. "ACLU of New Jersey v Schundler, 168 F3d 92, 98 at fn 6 (3rd Cir 1999) states en banc hearings afford the full court an opportunity to correct panel decisions the court is not willing to be bound to. The purpose is to achieve consistency within the circuit. Corder v. Gates, 947 F2d 374, 380 at fn 8 states irreconcilable intra-circuit conflict may justify an en banc hearing.

Cases in some circuits have held that filing deadlines were not jurisdictional. "Montoya v. Chao, 296 F3d 952.955 (10th Cir 202) states that the circuits are split regarding whether the limitation is jurisdictional. The 10th Circuit held it was not jurisdictional.

In so holding, it agreed with the 9th Circuit, "Williams-Scaife v. Department of Def Depen Schools" 925 F2d 346, 348 (9th Cir 1991) and the 7th Circuit, "Blaney v. US, 34 F3d 509, 512-513 (7th Circuit 1994).

ARGUMENT

1. Attachment No. 1 (see Appendix "G" at Supreme Court submission) is a photo copy of the envelope used to mail the "Petition For Review" to the court. Please note that the postal stamp is clearly dated June 11, 2004. The petitioner definitely recalls mailing the letter at the post office during the 1:00 P.M. hour and being told by the postal clerk that the letter would arrive at its destination on Monday, June 14,

2004 and no later than Tuesday, June 15, 2004. Asked by the postal clerk if the petitioner needed a return receipt the petitioner decided not to go the expense of a return receipt since the clerk had stated that the letter should be in Washington by the 14th.

2. Attachment No. 2 (see Appendix "E" at Supreme Court submission) is a copy of the letter from the Clerk's Office informing a Ms. Carroll and not the petitioner that the petition was "received out of time". This error indicates that there was a "mix up" in the handling of the "Petition For Review" in this instant case. This alone is cause for excusing a one day late filing date stamp which is highly questionable since the appeal was mailed on June 11, 2004.

3. The petitioner filed a "Request For Reconsideration" (see Appendix "F" at Supreme Court submission) mailed to the staff attorney on the Office of the clerk, dated June 30, 2004. Subsequent to that request the petitioner received a letter back from the Office of the Clerk stating the case would be reviewed in early August, 2004.

4. This instant case was docketed on July 22, 2004 and revised. (see Appendix "H" Supreme Court submission) The revision indicates that there may have been some additional confusion in the handling of this instant case at the Office of the Clerk.

SUMMARY

In consideration of and for the reasons stated above this court en banc should reverse the panel review on this issue of

timeliness.

Dated: October 3, 2004

s/ _____

Theodore C. Lange, pro se
398 Waldo Aves. SE, Apt. 6F
Salem, OR 97302
Ph. 503-316-9978

Theodore C Lange
Jan. 10, 2005